

Europlast, Ltd. and Lucile Gauger and Sigrid Laing. Cases 30-CA-10942(E) and 30-CA-10942-2(E)

June 16, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On February 19, 1993, Administrative Law Judge William F. Jacobs issued the attached supplemental decision, pertinent portions of which are attached. The Applicant filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, as modified, and conclusions and to adopt the recommended Order.

The judge dismissed the Applicant's application for an award under the Equal Access to Justice Act,¹ finding, inter alia, that the General Counsel was substantially justified in filing exceptions with the Board because the exceptions disputed the credibility determinations reached by the judge. In affirming the judge's finding, we observe that the exceptions were based on more than a dispute over the judge's credibility resolutions.

Even accepting the judge's credibility resolutions, the General Counsel reasonably argued that the judge should have drawn other inferences from the record that would have supported the General Counsel's position. For example, the General Counsel contended that the judge erred in failing to infer from evidence of disparate treatment in the issuance of warnings that the Respondent Applicant would not have disciplined Gauger and Laing absent their union activities. The General Counsel also argued in his exceptions that it was reasonable to infer from the shifting reasons proffered by the Respondent for its delay in recalling Gauger that the failure to recall Gauger before less senior employees was discriminatorily motivated. Because it was possible to draw a set of inferences from the circumstances here that would have supported the General Counsel's position, we find that the General Counsel's arguments had a reasonable basis in law and fact and were therefore substantially justified within the meaning of the Equal Access to Justice Act. See *Bennington Iron Works*, 278 NLRB 1087, 1088 (1986). That the arguments ultimately proved to be unpersuasive is insufficient to sustain the application because they were not insubstantial. *Lion Uniform*, 285

NLRB 249, 258 (1987). Accordingly, we shall dismiss the application.

ORDER

The application of the Applicant, Europlast, Ltd., Endeavor, Wisconsin, for an award under the Equal Access to Justice Act is dismissed.

APPENDIX

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

WILLIAM F. JACOBS, Administrative Law Judge. My decision in the above consolidated cases issued on June 30, 1992, recommending dismissal of the complaint in its entirety. Subsequently, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of my decision. On October 27, 1992, the Board adopted the recommended Order. Pursuant to the Equal Access to Justice Act (EAJA), Public Law 96-481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations, Respondent, on November 23, 1992, filed with the Board in Washington, D.C., an application for fees and expenses with attachments in support thereof. On November 2, 1992, the Board referred this matter to me for appropriate action. Subsequently, the General Counsel moved to dismiss the application and thereafter filed its opposition to General Counsel's motion.

The General Counsel's Motion to Dismiss is based on several grounds including the argument that the position taken by the General Counsel on the record as "substantially justified."¹ I find this point well taken.

Thus, the Union, in October 1989, undertook an organizational drive among Respondent's employees. The alleged discriminatees were activists in the drive. Under the small plant theory,² the General Counsel could justifiably conclude that the union activities both Gauger and Laing had come to the attention of management. When, within a few days, Laing was assigned more onerous tasks and subsequently both Gauger and Laing received warnings concerning their job performances, the General Counsel, relying on the timing of events, was justified in crediting Gauger and Laing, and in concluding that the measures taken by Respondent were in retaliation for the union activities of the alleged discriminatees. The General Counsel was also justified, relying on the testimony of Gauger and Laing, in taking the position that subsequent events, the failure of Respondent to recall Gauger and Laing in order of seniority and their eventual termination, were part of the entire pattern of discrimination.

The scenario upon which the issuance of complaint was grounded, is based chiefly on the testimony of Gauger, Laing, and other witnesses which the General Counsel credited. Though the Region was made aware of the position of Respondent during the investigation, it did not, of course, enjoy the benefit of the detailed and credible testimony of Respondent's witnesses which was first made available late

¹ Sec. 203(a)(1) of the EAJA provides that only prevailing parties are entitled to awards and that, even if the applicant prevailed, it may not be awarded fees and expenses if the Government's position was substantially justified.

² *Wiese Plow Welding Co.*, 123 NLRB 616 (1959).

¹ 5 U.S.C. § 504 (1982).

in the trial, testimony supported in full by documentation not made available earlier. Moreover, the General Counsel had no way of foreseeing that I would make the credibility determinations which I did, most frequently in favor of Respondent's witnesses and against those of the General Counsel. Indeed, where it is foreseen that a particular case will be decided on the basis of witnesses' credibility, it is usually, though not always,³ the trier of fact, and not the General Counsel, which must determine whether a particular witness' testimony is worthy of belief or should be discounted,⁴ and the mere fact that I did not find the General Counsel's witnesses credible does not mean that the decision to issue complaint and litigate the case was not substantially justified.⁵

³ *Natchez Coca-Cola Bottling Co. v. NLRB*, 750 F.2d 1350 (5th Cir. 1985), affg. *Natchez Coca-Cola Co.*, 269 NLRB 877 (1984).

⁴ *Leeward Auto Wreckers*, 283 NLRB 574 (1987), modified as to other issues, 841 F.2d 1143 (D.C. Cir. 1988); *M.P.C. Plating, Inc.*, 301 NLRB 785 (1991).

⁵ *Temp Tech Industries v. NLRB*, 756 F.2d 586 (7th Cir. 1985).

Similarly, since the General Counsel could not foresee my credibility determinations, there was substantial justification for the filing of the brief.⁶ Exceptions were likewise substantially justified.⁷

Inasmuch as I have found the position of the General Counsel, throughout all stages of the underlying unfair labor practice case, to be substantially justified in law and fact,⁸ I shall recommend that the application for attorney's fees and expenses be dismissed.

ORDER

It is hereby ordered that the application be dismissed.

⁶ *Lion Uniform*, 285 NLRB 249 (1987).

⁷ *Ibid.*

⁸ My disposition of the substantial justification issue obviates the necessity of reaching the other issues raised by the General Counsel in the motion to dismiss the application.